

SEC Releases Form 8-K FAQs

On November 23, 2004, the staff of the SEC's Division of Corporate Finance released answers to 30 FAQs about the new Form 8-K items. This SEC Alert summarizes selected matters discussed in the FAQs. The FAQs may be found on the SEC's website at: <http://www.sec.gov/divisions/corpfin/form8kfaq.htm>. We previously issued a Securities Alert on April 1, 2004, which can be found on our website at www.ropesgray.com under "News & Publications," that describes the recent amendments to Form 8-K.

General

- Periodic Reports. Except for Item 4.01 (Changes in Registrant's Certifying Accountant) and Item 4.02 (Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review), registrants may, in lieu of filing a Form 8-K, disclose in a periodic report triggering events occurring within 4 business days before the filing of the report.
- Subsidiaries. Other than items that clearly apply only at the registrant level (such as changes in directors and principal officers), triggering events apply to both registrants and their subsidiaries.

Item 1.01 Entry Into a Material Definitive Agreement

- Materiality. If an agreement that was not material when entered into later becomes material, the registrant need not file a Form 8-K under this Item. However, an amendment (even if immaterial) to a material agreement not previously disclosed triggers Form 8-K disclosure. In any event, if an agreement is material at any time during a period, the registrant must file the agreement as an exhibit to the periodic report for that period.
- Informal Compensation Arrangements. If a "summary sheet" memorializes or sets forth an agreement, plan or arrangement regarding the terms of the directors' compensation, it must be disclosed on a Form 8-K and filed as an exhibit under Item 601 of Regulation S-K. The 4 business days would run from when the terms were set, rather than from when the summary is provided to the director. Similarly, an oral agreement regarding compensation terms would also have to be disclosed (and a written summary filed as an exhibit to the periodic report for the period in which the terms were set).
- Placement Agency and Underwriting Agreements. Agreements with "underwriters" are presumptively material agreements under Item 601 of Regulation SK. A registrant must determine whether any particular placement agency or underwriting agreement is material using established standards of materiality. If the registrant determines that such an agreement should be filed under Item 1.01, it may, as under Item 3.02, omit the identity of the underwriters from the disclosure in the Form 8-K to remain within the safe harbor of Rule 135c.
- Employment Agreements. Employment agreements with directors and named executive officers must always be disclosed. An employment agreement with an executive officer who is not a "named executive officer" must be disclosed unless "immaterial in amount or significance." Materiality must be assessed using a reasonable investor standard.
- Equity Compensation Plans. The adoption by a registrant's board of directors of an equity compensation plan in which named executive officers are eligible to participate triggers disclosure under this Item. If the compensation plan

(or an amendment) is subject to shareholder approval, the obligation to file a Form 8-K is triggered upon receipt of that approval.

- Equity Awards Pursuant to Previously Disclosed Equity Compensation Plans. If a Form 8-K filed to report the adoption of an equity compensation plan discloses all material terms and conditions of individual awards (other than the identity of the recipient, the grant date, the number of securities covered by the award, the price(s) at which the recipient may acquire the securities, and the vesting schedule; in other words, the form of award), and the plan and form of award are filed as exhibits to a periodic report, the registrant is not required to file a Form 8-K to disclose an individual award, unless disclosure of particular provisions in such award (other than those described above) would be necessary for an investor's understanding of that award under the plan. This interpretation confirms the wisdom of making sure a form of award agreement is on file as an exhibit.
- Cash Bonus Plans. The adoption of a cash bonus plan under which named executive officers are eligible to participate must be disclosed on a Form 8-K even if no specific performance criteria, performance goals or bonus opportunities have been communicated to plan participants. If the Form 8-K reporting the plan's adoption did not disclose the specific performance goals and business criteria for the performance period, the registrant must disclose these measures on a Form 8-K when they are set. However, the registrant is not required to disclose target levels with respect to specific quantitative or qualitative performance related-factors, or factors or criteria involving confidential commercial or business information, the disclosure of which would have an adverse effect on the registrant.

Item 1.02 Termination of a Material Definitive Agreement

- Notice of Termination. Once a notice of termination has been received pursuant to the terms of a material definitive agreement, a registrant must file a Form 8-K. The instruction that says no disclosure is required solely because of negotiations or discussions about a termination does not trump the requirement that, if there is a notice of termination, disclosure is required. The triggering event is the sending of the notice, not the actual termination of the agreement.

Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant

- Contingent Obligations Arising Under Off-Balance Sheet Arrangements. Disclosure is required upon the creation of a contingent, off-balance sheet obligation, even where the registrant is not aware of the transaction. The staff reminded us that a registrant must ensure that its disclosure and internal controls are designed to deal with situations where a registrant may not be a party to the transaction creating the obligation. The SEC has provided up to four additional business days as a "grace" period given the nature of the requirement under Item 2.03 of Form 8-K.

Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement

- Timing. If an agreement requires a notice to be declared or sent prior to the increase or acceleration of a direct financial obligation, then Form 8-K disclosure is not required until the declaration or notice, even if all facts necessary to the triggering event have occurred.

Item 2.05 Costs Associated with Exit or Disposal Activities

- Accounting Standards. Costs disclosable under this Item are not limited to SFAS No. 146. Similar costs that may trigger Form 8-K disclosure are addressed by Statements No. 87, 88, 106 and 112.
- Timing. If a registrant is terminating employees as part of a plan to exit an activity, consistent with SFAS No. 146, a Form 8-K need not be filed until those employees have been informed.

Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

- Second Notification. A registrant that has taken appropriate action to prevent reliance on its financial statements and has also filed a Form 8-K under Item 4.02(a) need not file a second Form 8-K if its auditor notifies it that the auditor has reached the same conclusion.

Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers

- Timing. The obligation to report any resignation, retirement or refusal to stand for re-election is triggered by a notice from the director or executive officer, whether or not such notice is written. Whether a communication or discussion constitutes notice is a facts and circumstances determination. The disclosure should specify the effective date of the resignation or retirement. Note that if a registrant decides not to nominate a director for re-election at its next annual meeting, no Form 8-K is required. Of course, if the director resigns because he or she is not re-nominated, a Form 8-K would be required.
- Permissible Delays. This Item permits a registrant to delay the disclosure of the appointment of a new principal officer until its public announcement. If the principal officer is also named a director and enters into an employment agreement, these disclosure may also be delayed under both Item 5.02 and Item 1.01 of Form 8-K until the registrant makes a public announcement of the event.
- Adequacy of Disclosure. Where an officer's departure is also the termination of a material employment agreement, the registrant need not state the reasons for the officer's departure. It is sufficient for the registrant to state in its Item 1.02 disclosure that the employment agreement was terminated in conjunction with the officer's departure. This position does not permit a registrant to avoid disclosing other "material circumstances" surrounding the termination, such as resulting severance payments or other consequences.
- Principal Accounting Officers. Even if a registrant does not consider its principal accounting officer an executive officer for purposes of Items 401 or 404 of Regulation S-K, all of the information required by Item 5.02(c)(2) regarding specified newly appointed officers is required to be reported on Form 8-K.
- Broad Interpretation of Termination. The term "termination" includes situations where an officer identified in Item 5.02 may still be employed by the registrant but where he or she has been demoted or has had his or her duties and responsibilities removed.

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year

- Restatements. A registrant need not file a Form 8-K if it merely restates its articles of incorporation without any substantive changes to the articles of incorporation. However, the SEC recommends that registrants file the restatement in their periodic report for ease of reference by investors.

Contact Information

If you have any questions or would like to learn more about these rules, please contact your usual legal advisor at Ropes & Gray.